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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SUSAN METSCH et al., Plaintiffs and Appellants, v. JESSE HEINOWITZ et al., Defendants and Respondents.	D074999 (Super. Ct. No. 37-2017-00028176-CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Timothy B. Taylor, Judge. Affirmed.

Metsch Law Group, Paul S. Metsch, and Michael J. Mason for Plaintiffs and Appellants.

Freeman Mathis & Gary and David G. Molinari for Defendants and Respondents.

Plaintiffs Terry Metsch (Metsch) and Susan Metsch (S. Metsch) (together Plaintiffs) sued defendant Jesse Heinowitz for breach of contract, breach of fiduciary duty, and conversion and sued defendant Rachel King for breach of contract. All of

Plaintiffs' claims arise out of contractual and partnership relationships for the production and distribution of edible cannabis products, as alleged in more detail in the operative complaint.1 Heinowitz and King (together Defendants) brought a motion for summary judgment, which the trial court granted on the basis that, because the alleged agreements involved transactions with a Schedule I controlled substance—i.e., marijuana—they were illegal. More specifically, the court ruled that it would not provide assistance in prosecuting civil claims for relief that were based on illegal activities. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

" 'Because this case comes before us after the trial court granted a motion for summary judgment, we take the facts from the record that was before the trial court when it ruled on that motion.' " (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 716-717.) We consider all the evidence in the moving and opposing papers, except those portions of Metsch's declaration testimony to which objections were made and sustained,2 liberally construing and reasonably deducing inferences from Plaintiffs' evidence and resolving any doubts in the evidence in Plaintiffs' favor. (*Id.* at p. 717; Code Civ. Proc., § 437c, subd. (c).)

In their original complaint, for which Plaintiffs used Judicial Council forms, Plaintiffs alleged four causes of action against the two Defendants: breach of a written

1 Unless indicated otherwise in context, we do not differentiate between "marijuana" and "cannabis" and use the words interchangeably.

2 Plaintiffs do not challenge these evidentiary rulings on appeal.

contract, conversion, and breach of fiduciary duty against Heinowitz; and breach of a written contract against King.

In the original complaint, all three of Plaintiffs' claims against Heinowitz were based on the allegation that Plaintiffs and Heinowitz entered into a January 2014 written agreement, the "essential terms" of which were that Metsch, S. Metsch, and Heinowitz each "would own a ⅓ interest in Chronic Catering." Elsewhere in the complaint, Plaintiffs alleged that they and Heinowitz were "general partners in Chronic Catering" and that Chronic Catering owned property—including, specifically, "intellectual property" and "recipes." Plaintiffs further alleged that, in September 2015, Heinowitz breached the written agreement by "[c]onverting the assets of Chronic Catering to Heinowitz's own use and/or for the use and benefit of Kaneh Co., without Plaintiffs' consent." These same allegations formed the bases of Plaintiffs' claims for conversion and breach of fiduciary duty. With regard to remedies, Plaintiffs sought general damages of "at least $500,000"; punitive damages; a declaration that "Plaintiffs' [*sic*] own the intellectual property of Chronic Catering and its recipes"; interest; attorney fees; and costs.

In their breach of contract claim against King, Plaintiffs alleged that, in January 2014, King entered into a written agreement, the "essential terms" of which were set forth in the exhibit attached to the complaint. The exhibit, entitled "CONSULTING AGREEMENT," is an unsigned undated one-page typewritten document between *Chronic Catering* (with no mention of Plaintiffs, Heinowitz, or any other party) and King and contains the following terms: Chronic Catering "produces certain baked goods and

other edibles for the medicinal marijuana industry"; King "is a chef, with experience in baked good and desserts"; and in exchange for specified payments, King, as an independent contractor, "will assist Chronic Catering" in developing Chronic Catering's menu, creating Chronic Catering's recipes, setting up Chronic Catering's kitchen, and training Chronic Catering's staff. Another "essential" term of the King contract was that King "will not provide [her recipes] to any other individual or company that develops and sells backed [*sic*] goods and edibles in the medicinal marijuana industry." Plaintiffs further alleged that, in September 2015, King breached the written agreement by "[f]ailing to perform the contract terms"—for which Plaintiffs sought damages of $500,000 and attorney fees.

A week after answering the complaint, Defendants filed a motion for judgment on the pleadings. In relevant part, Defendants argued that, because Plaintiffs were not "licensed . . . to operate commercial cannabis activities[,] . . . every cause of action rests on an illegal transaction preventing Plaintiffs from obtaining judicial relief." Plaintiffs opposed the motion, and Defendants replied to Plaintiffs' opposition; but, before the court could hear the matter, Plaintiffs voluntarily filed a first amended complaint (FAC), mooting Defendants' motion.

In their FAC, for which Plaintiffs again used Judicial Council forms, they asserted the same four causes of action against the same two Defendants, checking almost all the same boxes and alleging almost all the same case-specific facts as in the original complaint.

Again, all of Plaintiffs' claims against Heinowitz—i.e., breach of contract, conversion, and breach of fiduciary duty—were based on the allegation of a business relationship between Metsch, S. Metsch, and Heinowitz during the January 2014 – September 2015 time period. Unlike the original complaint (in which Plaintiffs alleged that each of them and Heinowitz owned one-third of *Chronic Catering*), in the FAC, Plaintiffs alleged that the "essential terms" of their written agreement with Heinowitz were: Metsch, S. Metsch, and Heinowitz each "would own a ⅓ interest in *a general partnership* to develop and produce baked good [*sic*] and chocolates ('General Partnership'). The Partnership was formed after Chronic Catering, a Domestic Nonprofit Corporation, was dissolved." (Italics added.) In support of their cause of action for breach of contract, Plaintiffs alleged that, "[w]ithout Plaintiffs' consent, Heinowitz took for his own use and benefit the assets of the Partnership." In support of their cause of action for conversion, Plaintiffs incorporated their allegations from the first cause of action and further alleged that, although "Plaintiffs had a right to possess all assets of the Partnership[,] . . . Heinowitz intentionally . . . took possession of the Partnership assets including . . . its intellectual properties and recipes. Heinowitz prevented Plaintiffs from having access to such assets and refused to return same [*sic*]. Instead, Heinowitz used the Partnership assets for his own use and benefit, exclusive of any business dealings with Plaintiffs." Finally, in support of their cause of action for breach of fiduciary duty, Plaintiffs incorporated the allegations of the first two causes of action and further alleged that, as "general partners in the Partnership," Metsch, S. Metsch, and Heinowitz owed each other "a fiduciary duty of fair dealing and honesty," but that in September 2015,

"Heinowitz breached his fiduciary duty to [Plaintiffs] by . . . stealing and converting the assets of the Partnership, including, without limitation, its intellectual property and recipes." As remedies, Plaintiffs sought damages of $500,000, interest, attorney fees, and costs.

In the FAC's fourth cause of action, which was against King for breach of a written contract, Plaintiffs did not include or refer to the unsigned undated consulting agreement between Chronic Catering and King that Plaintiffs had attached to the original complaint. Instead, in alleging the "essential terms" of their January 2014 written agreement with King, Plaintiffs used much of the same language from the unsigned undated consulting agreement with three notable exceptions: (1) Plaintiffs affirmatively alleged that their relationship with Heinowitz was a general partnership; (2) Plaintiffs no longer alleged the involvement of Chronic Catering; and (3) Plaintiffs did not mention—as prominently set forth in the first paragraph of the consulting agreement—that "the baked goods and other edibles" for which King had undertaken contractual obligations were "for the medicinal marijuana industry." Plaintiffs alleged that the parties to the January 2014 written agreement were Metsch, S. Metsch, Heinowitz, and King and that the "essential terms" of the agreement were : "King is a chef, with experience in baked goods and desserts"; "The Partnership hired King, as a consultant, to develop recipes and baked good products for the Partnership, and to set up a kitchen and train staff"; "King agreed that her work product would be proprietary and confidential to the Partnership"; the Partnership paid King $3200 at the time the contract was signed; and the Partnership would pay King $3200 at the time she completed her work. Plaintiffs further alleged that

King breached the written agreement by "[f]ailing to perform the contract terms for the benefit of the Partnership, including . . . providing recipes to the Partnership." As a remedy, Plaintiffs sought damages of $100,000 and costs of suit.

Defendants filed a motion for summary judgment or, in the alternative, summary adjudication of the first, third and fourth causes of action in Plaintiffs' FAC. In support of their motion for summary judgment, Defendants argued that, because "the commercial cannabis operation at the center of Plaintiffs' [FAC] is illegal and a violation of criminal law . . . [¶] . . . , the transaction upon which the case is based is illegal[;] and pursuant to California Civil Code Section 3517 Plaintiffs have no right to come into Court and seek recovery or enforcement based on an illegal transaction."3 (Italics deleted.) Perhaps anticipating Plaintiffs' response to Defendants' illegality of contract defense, in support of their motion, Defendants also argued that neither Metsch, S. Metsch, nor Chronic Catering had a valid license to operate a commercial cannabis business.

Plaintiffs opposed the motion on the basis that, because their claims did not involve a " '<u>commercial</u> cannabis operation,' " no license was required. More specifically, Plaintiffs explained: "Plaintiffs and Heinowitz, using the 'Chronic Catering' brand, operated under California Holistics, Inc., a California nonprofit mutual benefit corporation ('California Holistics['']). California Holistics was a California Cooperative ('Co-Op'), properly formed under the Compassionate Use Act (Health and Safety Code Section 11362.5) and the Medical Marijuana Program Act (Health and Safety Code

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3 "No one can take advantage of his own wrong." (Civ. Code, § 3517.)

Section 11362.7). California Holistics did not operate for profit. Therefore, it was not an 'illegal' enterprise, and claims arising from [the former partnership between Plaintiffs and Heinowitz] are enforceable." Applying this argument to the claim against King, Plaintiffs similarly explained that, "because California Holistics was a Co-Op, using the Chronic Catering brand, the King Contract was legal and enforceable."

For evidence in support of their opposition argument, Plaintiffs presented Metsch's declaration and a number of exhibits.4 According to this evidence, in October 2011, Metsch formed "Chronic Catering, a California Nonprofit Mutual Benefit Corporation" (CC Inc.). CC Inc.'s articles of incorporation describe one specific purpose of the corporation (at times, referred to by the parties as a "Collective" or a "Co-Op") to be " 'to operate a not for profit entity to . . . [¶] . . . facilitate and coordinate the means to cultivate and distribute natural and organic healthcare products and holistic wellness therapies, including medical cannabis, between the qualified patients and primary caregiver members of the Collective only. The Collective and its members shall not purchase medical cannabis from, sell to, nor facilitate medical cannabis transactions with non-members of the Collective pursuant to California Health and Safety Code sections 11362.5 and 11362.7, 11362.765 et seq.' " Metsch, S. Metsch, and Heinowitz operated CC Inc., as follows: Metsch's responsibilities included "branding, product development and business development"; S. Metsch's responsibilities included assuming

4 Defendants filed, and the trial court sustained, written evidentiary objections to specific portions of Metsch's declaration testimony in opposition to the motion. Our factual summary is limited to the evidence admitted by the trial court.

the position of "head baker"; and Heinowitz's responsibilities included "daily operations and account management."

Metsch formally dissolved CC Inc. in July 2012. Thereafter, Metsch, S. Metsch, and Heinowitz formed a partnership in which the three of them "created edible baked goods using the Chronic Catering name and brand" (Old Partnership).5 The Old Partnership conducted this activity "[u]nder the . . . umbrella" of California Holistics, Inc. (California Holistics), which was incorporated in September 2013. The Old Partnership "operated" until December 2014, although it "remained in effect" thereafter because the partners never agreed to terms of "a buy-out."

The September 2013 articles of incorporation for California Holistics were filed with the Secretary of State. They described, in part, the same specific purpose as in CC Inc.'s articles of incorporation (quoted two paragraphs above). Metsch testified that California Holistics did not earn a profit: "[U]sing the Chronic Catering brand," California Holistics "provided baked good (cannabis edibles) at a reasonable cost to its members" in exchange for which California Holistics "received donations to cover operational costs and reasonable compensation to produce the products."

King, who was an executive pastry chef, was interested in creating recipes and processes for producing new cannabis edibles. At some point during the April – August 2014 time period—i.e., approximately two years *after* the July 2012 dissolution of CC Inc.—King entered into an agreement *with the Old Partnership* to provide these

5 The evidence does not indicate the date on which the partners formed the Old Partnership.

services during the August – September 2014 time period (King contract). The unsigned undated consulting agreement, a copy of which was attached to Plaintiffs' original complaint, is an unsigned undated copy of the King contract.6 Although King received the $3,200 initial payment required under the King contract (with the Old Partnership), "King failed to provide any services under the contract to Old Partnership."

Instead, King provided the consideration required by the King contract—i.e., developing a menu, creating recipes, setting up a kitchen, and training staff—to a new and different partnership formed in March 2015 (New Partnership). The partners of the New Partnership were S. Metsch, Heinowitz, King, King's brother, and "Pat, last name unknown"; the New Partnership "operate[d] under business entities known as 'KanehCo' (aka 'Kaneh Company, LLC') and 'Palo Verde Group' ('PVG')"; and Heinowitz and King's brother "orchestrated the misappropriation and conversion" of the Old Partnership's assets to the New Partnership. The New Partnership both advertised on social media "the transition from Chronic Catering to KanehCo" and "offer[ed] both 'Chronic Catering' and [']KanehCo' brands simultaneously."

In reply, Defendants presented arguments related to what was legal or illegal in the cannabis industry and to the "confused stew of partnerships, entities and parties" described in Metsch's declaration and Plaintiffs' opposition. In this latter regard, Defendants emphasized that these "partnerships, entities and parties" and the relationships between and among them had not been mentioned previously by Plaintiffs

6 According to Metsch, Heinowitz had, but did not return, the *signed* agreement.

in their complaint, their FAC, or their opposition to Defendants' motion for judgment on the pleadings. Defendants relied on the general rule that a defendant moving for summary judgment is required to negate only the plaintiff's theories of liability as *alleged in the operative complaint*—not as presented for the first time almost a year after the filing of the action in an opposition to a summary judgment motion.

The next day, Plaintiffs filed a "Supplemental Memorandum" directed to Defendants' arguments as to what was legal in the cannabis industry. Plaintiffs argued that Defendants' reply improperly cited and relied on "**the current version**" of a particular statue dealing with licensing and regulations for medical marijuana cooperatives—i.e., Health and Safety Code section 11362.775 (Stats. 2017, ch. 27, § 140, eff. June 27, 2017). Instead, according to Plaintiffs, because the contracts at issue in the FAC were entered into in January 2014 and breached in September 2015, only the earlier version of section 11362.775 was potentially applicable. Significantly, the applicable version of *former* section 11362.775 did not contain the same licensing and regulations for medical marijuana cooperatives. (Stats. 2003, ch. 875, § 2, eff. Jan. 1, 2004.) The trial court disregarded this supplemental argument on the ground there is no court rule or order allowing a supplemental opposition after the filing of a reply brief in summary judgment proceedings.

Counsel presented oral argument, and at the conclusion of the hearing, the trial court granted Defendants' motion for summary judgment. As we introduced *ante*, the court sustained Defendants' objections to portions of Metsch's declaration testimony, thereby limiting the evidence in support of Plaintiffs' opposition. With regard to the

merits, the court ruled as follows: Plaintiffs' FAC "arises out of a contractual and partnership relationship in which the parties had operated an entity that produced and distributed edible cannabis products, Chronic Catering"; cannabis is a controlled substance; neither Plaintiffs nor any entity with which they were associated were licensed to be in a business involving cannabis; thus, "the purported contractual and partnership relationship giving rise to the [FAC] is illegal and cannot be the basis of a court action"; and Plaintiffs did not meet their responsive burden of either defeating Defendants' legal authorities or establishing an issue of material fact.

The trial court entered judgment in favor of Defendants, and Plaintiffs timely appealed.

II. DISCUSSION

The principal issue on appeal is whether the trial court erred in ruling that Defendants established, as a matter of law, that Plaintiffs' claims are based on agreements to perform, or to assist in the performance of, *illegal* marijuana transactions. If so, then the courts will not assist in providing relief to Plaintiffs, regardless of the merits of the claims; if not, then Plaintiffs are entitled to proceed with attempting to prove the merits of their claims.

As we explain, Defendants met their initial burden of producing evidence of a prima facie showing that there is a complete defense to Plaintiffs' FAC—namely, the affirmative defense of illegality of contract. As we further explain, Plaintiffs did not meet their responsive burden of establishing the existence of a triable issue of material fact.

A. *Law*

1. *Standards of Appellate Review*

Because the trial court's judgment is " 'presumed correct,' " Plaintiffs (as the appellants) have the burden of affirmatively establishing reversible error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, italics omitted; *Swigart v. Bruno* (2017) 13 Cal.App.5th 529, 535 (*Swigart*) [appeal from defense summary judgment].) For this reason, our review " 'is limited to issues which have been adequately raised and supported in [the appellant's] brief.' " (*Palm Springs Villas II Homeowners Assn., Inc. v. Parth* (2016) 248 Cal.App.4th 268, 279, fn. 4 (*Palm Springs Villas*).)

We review de novo an order granting summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*).) As a practical matter, " ' "we assume the role of a trial court and apply the same rules and standards which govern a trial court's determination of a motion for summary judgment." ' " (*Swigart, supra,* 13 Cal.App.5th at p. 536.) In an appeal from a summary judgment, because "we review 'the ruling, not the rationale,' " we may affirm on any basis supported by the record and the law. (*Skillin v. Rady Children's Hospital – San Diego* (2017) 18 Cal.App.5th 35, 43 (*Skillin*).)

A defendant is entitled to a summary judgment on the basis that the "action has no merit" (Code Civ. Proc., § 437c, subd. (a)) only where the court is able to determine from the evidence presented that "there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" (*id.*, subd. (c)). A cause of action "has no merit" if one or more of the elements of the cause of action cannot be

established or an affirmative defense to the cause of action can be established as a matter of law. (*Id.*, subd. (o).)

Thus, the moving defendant has the ultimate burden of *persuasion* that one or more elements of the cause of action at issue "cannot be established" or that "there is a complete defense to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar*, *supra*, 25 Cal.4th at pp. 849, 850, 853-854.) In attempting to achieve this goal, the defendant has the initial burden of *production* to make a prima facie showing of the nonexistence of any triable issue of material fact. (*Aguilar*, at p. 850.) If the defendant meets this burden, then the burden of *production* shifts to the plaintiff to establish the existence of a triable issue of material fact. (*Id.* at pp. 850-851.)

Applying these principles in our de novo review of the grant of a summary judgment, therefore, we first must determine whether Defendants' initial showing establishes an entitlement to judgment in their favor as a matter of law. (*Aguilar*, *supra*, 25 Cal.4th at p. 850; *Swigart*, *supra*, 13 Cal.App.5th at p. 536.) If so, we must then determine whether Plaintiffs' responsive showing establishes a triable issue of material fact. (*Aguilar*, at pp. 850-851; *Swigart*, at p. 536.)

2. *Illegality of Contract*

One of the "essential" elements of a contract is that it have a "lawful object." (Civ. Code, § 1550, subd. (3).) As particularly applicable in the present case, a contract "must be lawful when the contract is made." (Civ. Code, § 1596.) Otherwise—i.e., where the object or the consideration of the agreement is illegal—"the entire contract is void." (Civ. Code, §§ 1598, 1608.)

A contract found to be illegal may not serve as the foundation of any action, either in law or in equity, and when the illegality of the contract renders the bargain unenforceable, a court will leave the parties where they were prior to the lawsuit. (*Kashani v. Tsann Kuen China Enterprise Co., Ltd.* (2004) 118 Cal.App.4th 531, 541 (*Kashani*); accord, *Wong v. Tenneco, Inc.* (1985) 39 Cal.3d 126, 135 [" ' "a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out" ' "]; *Lewis & Queen v. N.M. Ball Sons* (1957) 48 Cal.2d 141, 150 ["courts generally will not enforce an illegal bargain or lend their assistance to a party who seeks compensation for an illegal act"].)

" 'A bargain may be illegal because the performance that is bargained for is illegal; and the performance may be illegal because governmental authority has declared it to be a "crime" . . . . This is true whether the performance bargained for is one that is merely promised, to be rendered in the future, or is one that is rendered as the executed consideration for a return promise.' " (*Kashani, supra,* 118 Cal.App.4th at p. 542.) Since the doctrine of illegality of contracts is grounded in public policy, the focus is on whether the object of the contract is illegal, not on the extent of either party's participation in the illegality. (*McIntosh v. Mills* (2004) 121 Cal.App.4th 333, 346.)

In applying the illegality of contract doctrine as a defense, courts do not consider whether its application results in unjust enrichment in favor of the party opposing enforcement of the contract; i.e., rather than "secur[ing] justice" between the contracting parties, courts must consider " 'a higher interest—that of the public, whose welfare demands that certain transactions be discouraged.' " (*Fong v. Miller* (1951) 105

Cal.App.2d 411, 415, quoting *Takeuchi v. Schmuck* (1929) 206 Cal.782, 786; see Civ. Code, § 1608.) Very simply, " 'a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out[.]' " (*Lee On v. Long* (1951) 37 Cal.2d 499, 502.)

3. *Applicable Cannabis Statutory Law*

In applying California law regarding the legality of the transactions covered by the two contracts at issue in the FAC, the trial court applied the law in effect *at the time of the hearing on the motion* (July 2018). On appeal, Plaintiffs argue that, for purposes of determining whether the transactions, and thus the contracts, were legal, the court was required to apply the law in effect *at the time the parties entered into the contracts at issue* (Jan. 2014). Plaintiffs are correct. As we introduced *ante*, a contract "must be lawful when the contract is made." (Civ. Code, § 1596.)

"Ordinarily, ' "all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated." ' " (*City of Torrance v. Workers' Comp. Appeals Bd.* (1982) 32 Cal.3d 371, 378 (*City of Torrance*); accord, *Swenson v. File* (1970) 3 Cal.3d 389, 393 (*Swenson*).) Stated differently, and as applicable in the present appeal, "laws enacted subsequent to the execution of an agreement are not ordinarily deemed to become part of the agreement unless its language clearly indicates this to have been the intention of the parties." (*Swenson*, at p. 393.)

Swenson involved a covenant in a partnership agreement which provided that a retired partner would not " 'render service to a client which has its principal office within a radius of twenty miles from any partnership office which existed on the date of his retirement.' " (*Swenson, supra*, 3 Cal.3d at p. 392.) When the agreement was made, this provision was *invalid* under then-applicable former section 16602 of the Business and Professions Code—which in part restricted a former partner from competing for clients located in areas beyond the boundaries of the cities or towns where the partnership had its offices. (*Ibid.*) A year later, former section 16602 was revised to permit countywide restrictions; and shortly thereafter, the defendant withdrew from the partnership and began a competing business in the same county. (*Id*. at pp. 391-392.) Our Supreme Court held that the covenant was enforceable (to bar the retired partner's services), since the partnership agreement could not be interpreted as incorporating the amended statute: "[T]to hold that subsequent changes in the law which impose greater burdens or responsibilities upon the parties become part of that agreement would result in modifying it without their consent, and would promote uncertainty in commercial transactions." (*Id.* at p. 394.) After all, "the parties could have originally agreed to incorporate subsequent changes in the law," but did not. (*Id.* at p. 395.)

Likewise, in the present case, we hold that changes in the law *in 2017* which imposed greater burdens or responsibilities on Plaintiffs and/or Defendants did not become part of or otherwise invalidate *the 2014 agreements* (which Plaintiffs alleged were breached in Sept. 2015). Since there is no evidence that the parties here agreed to incorporate subsequent changes in the law into either of the contracts at issue, to

conclude otherwise would result in improperly modifying the contracts without the parties' consent. (*Swenson, supra*, 3 Cal.3d. at p. 395.)

4. *Burdens of Proof and the Production of Evidence*

Evidence Code section 500 provides in relevant part that "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." As a general rule, therefore, the plaintiff has the burden of proving each element of each cause of action alleged (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 436 (*California Farm*)); and the defendant has the burden of proving each element of each affirmative defense alleged (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 33 (*Waller*)).[7] "The terms 'burden of proof' and 'burden of persuasion' are synonymous." (*California Farm, supra*, 51 Cal.4th at p. 436, fn. 17.) This burden " 'does not shift' "; " 'it remains with the party who originally bears it.' " (*Id*. at p. 436, italics omitted.)

As generally applicable here, the party asserting an illegality has the burden of proof. (2 Schwing, Cal. Affirmative Def. (2d ed. 2019) § 37:30; see Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue."].) As specifically applicable here, "the burden of proof of unlawful purpose [of a transaction] is upon the person asserting the illegality." (*Hamilton v.*

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7 Although "fairness and policy may sometimes require a different allocation"—where, for example, "the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties" (*Morris v. Williams* (1967) 67 Cal.2d 733, 760)—no party suggests that the present case raises such concerns

Abadjian (1947) 30 Cal.2d 49, 53; accord, *Morey v. Paladini* (1922) 187 Cal. 727, 734 ["The burden ordinarily rests upon the party asserting the invalidity of the contract to show how and why it is unlawful"]; *Sweeney v. KANS, Inc.* (1966) 247 Cal.App.2d 475, 480 [because "illegality is, of course, an affirmative defense . . . [, t]he burden of establishing this defense was, therefore, on the defendant"].)

Evidence Code section 110 provides: " 'Burden of producing evidence' means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." The " 'burden of producing evidence as to a particular fact' " is different from the burden of proof, although it " 'rests on the party with the burden of proof as to that fact.' " (*California Farm*, *supra*, 51 Cal.4th at p. 436.) Thus, once a plaintiff has produced evidence of its prima facie case, the burden of producing evidence shifts to the defendant to establish the necessary facts in support of any affirmative defense. (*Ibid*.)

Defendants acknowledge in their appellate brief that they sought summary judgment "based on an affirmative defense" that the transactions in the contracts alleged in the FAC were illegal. As such, Defendants had the burden of proving each of the elements of their affirmative defense. (Evid. Code, § 500; *Waller*, *supra*, 11 Cal.4th at p. 33.)

B. *Analysis*

1. *Defendants' Met Their Initial Burden of Production of Evidence (Code Civ. Proc., § 437c, Subd. (p)(2))*

Defendants attempted to meet their initial burden of showing illegality by establishing the following facts, each of which (and more) Defendants included in their

separate statement of undisputed material facts in support of their motion with citations to evidence: Plaintiffs owned Chronic Catering, which was a business that produced and sold edible cannabis goods and products; the agreement between Plaintiffs and Heinowitz was to operate Chronic Catering; the agreement between Plaintiffs and King was to assist Chronic Catering in developing a menu, creating recipes, setting up a kitchen, and training a staff (for Chronic Catering's business of producing and selling edible cannabis goods); and neither Chronic Catering nor either of Plaintiffs was licensed to operate a commercial cannabis business by the State of California, the County of San Diego, or the City of San Diego. The trial court's rulings are consistent with these facts.8

Defendants then presented legal authority showing both that cannabis is a Schedule I controlled substance (Health & Saf. Code, § 11054, subd. (d)(13)[9]) and that

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8 Although Plaintiffs disputed some of these facts in their response to Defendants' separate statement of undisputed material facts, in their appellate brief, they do not contend that *any* of the facts they previously disputed presents a basis for ruling that Plaintiffs did not meet their initial burden of production of evidence. As a general rule, we would not review the unchallenged showing. (*Palm Springs Villas, supra*, 248 Cal.App.4th at p. 279, fn. 4.)

At oral argument, however, counsel indicated that Defendants in fact dispute that the purpose of the King contract included involvement in the marijuana industry. According to counsel, the King contract only required King's involvement in unspecified, not necessarily illegal, menus, recipes, kitchens, and training at some unspecified time in the future. We disagree. The terms of the King contract include King's promise to "*assist Chronic Catering*"—an entity that "produces . . . edibles for the medicinal marijuana industry"—with *Chronic Catering's* "Menu development," "Recipe development," "Kitchen set up," and "Staff training" *during the* "*August-September 2014*" *time period*. (Italics added.) In short, Plaintiff's claim is that King breached the King contract by failing to assist Chronic Catering in its production of edibles for the medicinal marijuana industry in late summer 2014.

9 Health and Safety Code section 11054, subdivision (a) provides in full: "The controlled substances listed in this section are included in Schedule I." Section 11054,

the possession, cultivation, or processing of marijuana violates California law (Health & Saf. Code, §§ 11357, 11358, 11359, 11360[10]). Based on this showing of the facts and the trial court's ruling that the contractual and partnership relationship alleged in the FAC "is illegal," Defendants met their initial burden of producing evidence of a prima facie showing that there is a complete defense to the FAC.

We nonetheless note that Defendants and the court relied on statutes in effect no earlier than November 2016 (see fns. 9 & 10, *ante*), yet the alleged contracts at issue were entered into in September 2014. As we explained at part II.A.2., *ante*, however, a contract must be lawful *when made* (Civ. Code, § 1596); and because there is no indication that the parties intended later legislation to be incorporated into the contracts,

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subdivision (d) lists "Hallucinogenic substances"; and subdivision (d)(13) identifies "Cannabis." (Stats. 2017, ch. 27, § 120, eff. June 27, 2017 (amending Health & Saf. Code, former § 11054).)

10 Health and Safety Code section 11357 makes *possession* of cannabis illegal—"[*e*]*xcept as authorized by law*"—and provides for specified punishment depending on a number of factors. (Stats. 2017, ch. 253, § 15, eff. Sept. 16, 2017, italics added (amending Stats. 2017, ch. 27, § 122, eff. June 27, 2017).)

Health and Safety Code section 11358 makes *planting, harvesting, drying, or processing* cannabis plants illegal—"*except as otherwise provided by law*"—and provides for specified punishment depending on a number of factors. (Stats. 2017, ch. 27, § 123, eff. June 27, 2017, italics added (amending Prop. 64, § 8.2, eff. Nov. 9, 2016).)

Health and Safety Code section 11359 makes *possession of cannabis for sale* illegal—"*except as otherwise provided by law*"—and provides for specified punishment depending on a number of factors. (Stats. 2017, ch. 27, § 124, eff. June 27, 2017, italics added (amending Prop. 64, § 8.3, eff. Nov. 9, 2016).)

Health and Safety Code section 11360 makes *transportation, importation, sale, or gift* of cannabis illegal—"[*e*]*xcept as otherwise provided by this section or as authorized by law*"—and provides for specified punishment depending on a number of factors. (Stats. 2017, ch. 27, § 125, eff. June 27, 2017, italics added (amending Prop. 64, § 8.4, eff. Nov. 9, 2016).)

illegality must be determined *at the time of the formation of the alleged contracts in January 2014* (*City of Torrance*, *supra*, 32 Cal.3d at pp. 378-379; *Swenson*, *supra*, 3 Cal.3d at pp. 393-395). In this regard, the statutes in effect in January 2014 contain similar, if not identical, language as those applied by the court in July 2018.11 Thus, Defendants would have met their initial burden of production for summary judgment purposes had the court applied the same statutes as they read *in January 2014*: In January 2014, marijuana was a Schedule I controlled substance (Health & Saf. Code, former § 11054, subd. (d)(13) (Stats. 2002, ch. 664, § 130, eff. Jan. 1, 2003)); and in January 2014, California law prohibited its possession (Health & Saf. Code, former § 11357 (Stats. 2011, ch. 15, § 159, eff. Apr. 4, 2011, operative Oct. 1, 2011)), its planting, harvesting, drying, and processing (Health & Saf. Code, former § 11358 (Stats. 2011, ch. 15, § 160, eff. Apr. 4, 2011, operative Oct. 1, 2011)), its possession for sale (Health & Saf. Code, former § 11359 (Stats. 2011, ch. 15, § 161, eff. April 4, 2011,

11 Compare Health and Safety Code section 11054, subdivision (d)(13) (Stats. 2017, ch. 27, § 120, eff. June 27, 2017) with Health and Safety Code *former* section 11054, subdivision (d)(13) (Stats. 2002, ch. 664, § 130, eff. Jan. 1, 2003) (marijuana a Schedule I controlled substance); compare Health and Safety Code section 11357 (Stats. 2017, ch. 253, § 15, eff. Sept. 16, 2017) with Health and Safety Code *former* section 11357 (Stats. 2011, ch. 15, § 159, eff. Apr. 4, 2011, operative Oct. 1, 2011) (possession of marijuana a crime); compare Health and Safety Code section 11358 (Stats. 2017, ch. 27, § 123, eff. June 27, 2017) with Health and Safety Code *former* section 11358 (Stats. 2011, ch. 15, § 160, eff. Apr. 4, 2011, operative Oct. 1, 2011) (planting, harvesting, drying, processing marijuana a crime); compare Health and Safety Code section 11359 (Stats. 2017, ch. 27, § 124, eff. June 27, 2017) with Health and Safety Code *former* section 11359 (Stats. 2011, ch. 15, § 161, eff. April 4, 2011, operative Oct. 1, 2011) (possession of marijuana for sale); compare Health and Safety Code section 11360 (Stats. 2017, ch. 27, § 125, eff. June 27, 2017) with Health and Safety Code *former* section 11360 (Stats. 2011, ch. 15, § 162, eff. April 4, 2011, operative Oct. 1, 2011) (transportation, importation, sale, or gift of marijuana).

operative Oct. 1, 2011)), and its transportation, importation, sale, or gift (Health & Saf. Code, former § 11360 (Stats. 2011, ch. 15, § 162, eff. April 4, 2011, operative Oct. 1, 2011)).

In support of their summary judgment motion, Defendants also established, as a matter of law, that neither Metsch, S. Metsch, nor Chronic Catering had a license to operate a commercial cannabis business; and the trial court so ruled.12 However, since proof of the lack of a license is not an element of Defendants' affirmative defense of illegality, such proof is not part of Defendants' initial burden of production of evidence for the requisite prima facie showing of a complete defense to the complaint. (Evid. Code, § 500; *Waller*, *supra*, 11 Cal.4th at p. 33; Code Civ. Proc., § 437c, subd. (p)(2).)

We now turn to Plaintiffs' responsive showing to determine whether Plaintiffs established a triable issue of material fact.

2. *Plaintiffs Did Not Meet Their Responsive Burden of Production of Evidence (Code Civ. Proc., § 437c, Subd. (p)(2))*

In response to Defendants' motion, Plaintiffs argued that, because their claims did not involve a *commercial* cannabis operation, they enjoyed qualified immunity under applicable state law. In the alternative, Plaintiffs argued that, even if the court determined that Defendants established a prima case for an application of the illegality of contract doctrine, the court should not apply the affirmative defense, because Defendants came to court with unclean hands. Plaintiffs repeat both arguments on appeal. As we

12 The trial court described the principal argument in support of Defendants' summary motion to be: *Because* "Plaintiffs do not hold a valid license to produce and sell marijuana products, . . . the alleged agreement is illegal and unenforceable[.]"

explain, Plaintiffs did not meet their responsive burden of establishing *facts* that would support their claim for qualified immunity, and Plaintiffs forfeited appellate consideration of an application of the unclean hands doctrine to the affirmative defense.

a. *Qualified Immunity*

On appeal, Plaintiffs contend that, in January 2014, the illegalities of marijuana associated with Health and Safety Code former sections 11054, subdivision (d)(13), 11357, 11358, 11359, 11360, as they read in January 2014 did not apply to them. In support of this argument to the trial court, Plaintiffs presented evidence that described in detail the relationships during the October 2011 – February 2018 time period among and between Metsch, S. Metsch, Heinowitz, King, CC Inc., California Holistics, Chronic Catering (as a "name and brand"), the Old Partnership (Metsch, S. Metsch, and Heinowitz), the New Partnership (S. Metsch, Heinowitz, King, King's brother, and "Pat, last name unknown"), and KanehCo. (See pt. I., *ante* [detailed presentation of Plaintiffs' evidence].) Based on these facts, Plaintiffs argued to the trial court that "the Old Partnership, using the Chronic Catering brand, *operated under California Holistics*, a California Cooperative . . . [and] did not earn a profit"; thus, "Old Partnership was legal and any claims thereunder are enforceable." (Italics added.)

Without reaching the merits of Plaintiffs' argument, the trial court "disregarded" it. According to the court, the operative complaint "frame[s] and limit[s] the issues" for purposes of a defendant's summary judgment motion; summary judgment may not be denied based on any issue not raised in the operative complaint; and the FAC here did not plead either "a marijuana cooperative" or "California Holistics, the purported cooperative

entity identified in [Plaintiffs'] Opposition." The court's reasoning—based on Defendants' argument, which Defendants assert again on appeal—is that a defendant moving for summary judgment is required to defeat *only* "those ' "theories of liability *as alleged in the complaint*" ' and [is] not obliged to ' " ' "refute liability on some theoretical possibility not included in the pleadings," ' " ' simply because such a claim was raised in plaintiff's declaration in opposition to the motion for summary judgment." (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1254 (*Conroy*).)

In so ruling, the trial court erred. Although Defendants and the court relied on the well-accepted rule of summary judgment law that "the materiality of a disputed fact is measured by the pleadings" (*Conroy*, *supra*, 45 Cal.4th at p. 1254), the evidence Plaintiffs presented in opposition to Defendants' motion did not trigger an application of the rule. As against Heinowitz, the barebones FAC alleges that Metsch, S. Metsch, and Heinowitz were partners and that Heinowitz breached their written partnership agreement, resulting in claims for breach of contract, conversion, and breach of fiduciary duty. As against King, the barebones FAC alleges that Metsch, S. Metsch, Heinowitz, and King were partners and that King breached their written partnership agreement. Nothing in the more detailed evidence that Plaintiffs submitted in opposition to Defendants' motion expanded the claims or the theories of liability alleged in the FAC. More to the point, although Metsch's declaration introduced what Defendants described as "partnerships, entitles and parties that were not raised in the pleadings," Plaintiffs did so in support of their argument as to why they were exempt from the licensing

requirements on which Defendants relied in their motion; i.e., Plaintiffs did so only *in response to* Defendants' assertion of their affirmative defense of illegality of contract.

In short, "[n]o California decision requires that the proponent of the contract affirmatively plead that the contract underlying the cause of action is legal[.]" (2 Schwing, Cal. Affirmative Def. (2d ed. 2019) § 37:30.) The court erred in ruling otherwise here, because none of the four claims alleged in the FAC requires, as an element of any cause of action, evidence that Plaintiffs were licensed or exempt from the licensing requirements.

As we introduced *ante*, however, we review the trial court's ruling, not its reasoning and must affirm on any basis supported by the record. (*Skillin*, *supra*, 18 Cal.App.5th at p. 43.) The court's ruling was that Plaintiffs did not meet their responsive burden; and as we explain, this ruling is correct for a reason *other than* that expressed by the trial court.

On appeal, Plaintiffs contend they met their burden by establishing that, *at the time of the contracts alleged in the FAC* (i.e., Jan. 2014), although state law prohibited cultivation of marijuana, Health and Safety Code former section 11362.775 (Stats. 2003, ch. 875, § 2, eff. Jan. 1, 2004)13 provided a "qualified immunity" for an entity like

13 The trial court declined to consider application of Health and Safety Code former section 11362.775 (Stats. 2003, ch. 875, § 2, eff. Jan. 1, 2004) on the basis Plaintiffs did not timely bring to the court's attention this former version of Health and Safety Code section 11362.775 (Stats. 2017, ch. 27, § 140, eff. June 27, 2017). This was error. As we explained at part II.A.3., *ante*, the object of a contract must be legal at the time the contract is made (Civ. Code, § 1596); and for purposes of determining whether an agreement is illegal, unless the agreement provides otherwise, the applicable law is that

California Holistics—which Plaintiffs describe as "a properly formed and operating Cooperative." According to Plaintiffs, the Old Partnership (Metsch, S. Metsch, and Heinowitz) created edible baked good using the Chronic Catering name and brand "[u]nder the California Holistics umbrella." Plaintiffs' evidentiary showing, however, did not present a factual basis that established compliance with—and, thus, application of and protection by—former section 11362.775.

Health and Safety Code former section 11362.775 provided in full:

> "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570." (Stats. 2003, ch. 875, § 2, eff. Jan. 1, 2004.)

Accordingly, under former section 11362.775, for an association of individuals to "collectively or cooperatively . . . cultivate marijuana for medical purposes," the association must be comprised of "[q]ualified patients," "persons with valid identification cards," or "the designated primary caregivers" of such people. (*Ibid*.) Although Metsch testified that he, S. Metsch, and Heinowitz were all "qualified patients" for this purpose, the trial court sustained Defendants' evidentiary objection to this evidence. Because Plaintiffs do not challenge this evidentiary ruling on appeal, neither do we. (*Palm Springs Villas*, *supra*, 248 Cal.App.4th at p. 279, fn. 4.)

" ' "in existence when an agreement is made" ' " (*City of Torrance*, *supra*, 32 Cal.3d at p. 378; accord, *Swenson*, *supra*, 3 Cal.3d at p. 393).

Thus, since Plaintiffs may not rely on this testimony from Metsch, the record lacks evidence to support Plaintiffs' argument that Health and Safety Code former section 11362.775 provided an exception to the illegality associated with the contracts at issue in the FAC.14

b. *Unclean Hands*

Finally, Plaintiffs argue that, even if Defendants established their affirmative defense of illegality of contract, the court should not apply it—or, at a minimum, there is an issue of material fact as to whether to apply it—because Defendants have "unclean hands."

Our Supreme Court has described the unclean hands doctrine as follows: "The rule is settled in California that whenever a party who, as actor, seeks to set judicial machinery in motion and obtain some remedy, has violated conscience, good faith or other equitable principle in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf to acknowledge his right, or to afford him any remedy." (*Lynn v. Duckel* (1956) 46 Cal.2d 845, 850; accord,

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14 We are aware that the record contains a copy of California Holistics's articles of incorporation, which evidence one "specific purpose" of the nonprofit corporation to be to "facilitate and coordinate the means to cultivate and distribute natural and organic healthcare products and holistic wellness therapies, including medical cannabis[.]" However, the protections of Health and Safety Code former section 11362.775 applied only to associations comprised of "[q]ualified patients," "persons with valid identification cards," or "the designated primary caregivers" of such people. Thus, regardless of *California Holistics*'s authorized purposes, as a result of the trial court's evidentiary ruling, the record does not contain admissible evidence that Metsch, S. Metsch, or Heinowitz (or anyone else) qualified for membership in California Holistics (or in any association subject to the protections under former § 11362.775).

Stockton v. Ortiz (1975) 47 Cal.App.3d 183, 200 [unclean hands doctrine, "in general, prescribes, at law and in equity, that the courts will not aid either party to a transaction which is illegal or contrary to public policy where the parties are equally at fault, but will leave the parties where it finds them"].)

The trial court rejected Plaintiffs' attempt to apply the unclean hands doctrine to Defendants' affirmative defense on the basis that Plaintiffs did not allege Defendants' unclean hands in their FAC. On appeal, Defendants adopt the trial analysis, contending that the trial court did not err. Both the court and Defendants are wrong. The doctrine of unclean is not an element of any of the four causes of action in the FAC; and by asserting it in opposition to Defendants' summary judgment motion, Plaintiffs have not expanded their claims or alleged any new theories of liability. (See *Conroy, supra,* 45 Cal.4th at p. 1254.) To the contrary, Plaintiffs asserted the application of the unclean hands doctrine *as a defense* to Defendants' argument that the contracts at issue were illegal.

In any event, Plaintiffs have forfeited appellate consideration of this argument, since " 'we need not address contentions not properly briefed.' " (*Winslett v. 1811 27th Avenue, LLC* (2018) 26 Cal.App.5th 239, 248, fn. 6.) Plaintiffs' entire argument on the issue is one sentence: "Here, [Defendants] would be rewarded for their wrongdoings (unclean hands) if the [Old Partnership] and the King Contract are not enforced." [*Sic*.] Because Plaintiffs do not tell us either what they contend must be shown to apply the doctrine of unclean hands or what they contend Defendants did that qualifies as unclean hands, we "treat [Plaintiffs' unclean hands argument] as waived, and pass it without consideration." (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 139.)

III. DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(2).)

IRION, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.